No. ___ 061073 [illegible] 2006

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IN THE

# Supreme Court of the United States

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KATHY BLIESNER,

*Petitioner,*

v.

THE COMMUNICATION WORKERS OF AMERICA; VERIZON NORTHWEST, INC., fka GTE NORTHWEST, Incorporated,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. In a "hybrid" claim (under section 301 of the Labor Management Relations Act codified at 29 U.S.C. § 185) brought by an employee against: an employer for breach of a collective bargaining agreement; and against a union for breach of its duty of fair representation—may a court first consider and dismiss the claim against the employer, prior to ever considering the claim against the Union?

2. If a court may, in fact, dismiss the claim against the employer prior to considering the claim against the Union, is the dismissal of the claim against the employer necessarily dispositive of the claim against the Union?

3. Did the Ninth Circuit Court of Appeals err in holding that the Federal District Court did not abuse its discretion in striking portions of the Petitioner's affidavit regarding her belief as to the time necessary for training in the new position, while admitting portions of Respondents' affidavits on the same issue?

4. Did the Ninth Circuit err in affirming the District Court's grant of summary judgment, despite the fact that said decision(s) weighs the relative evidence introduced by the Petitioner and Respondents and does so in a light most favorable to the moving party?

## LIST OF PARTIES

The parties are as listed in the caption.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Bliesner v. Communication Workers of America*, 464 F.3d 910 (9th Cir. 2006). The opinion was filed September 13, 2006. The Ninth Circuit affirmed the March 31, 2004 decision of the United States District Court for the District of Idaho, which was not reported, but which is attached as Appendix Exhibit A. *See* Appendix Exhibit A.

## STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals was entered on September 13, 2006. *See* Appendix Exhibit C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Section 301 of the Labor-Management Relations Act, codified at 29 U.S.C. § 185*:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

*Federal Rule of Civil Procedure 56*:

(c) Motion and Proceedings Thereon.

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . .

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

*Federal Rule of Evidence 602*:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but not need, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

## STATEMENT OF THE CASE

1. Federal Jurisdiction in the court of first instance was based upon a federal question pursuant to 28 U.S.C. 1331—"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. This case arises as the result of Petitioner's loss of her employment with Respondent Verizon via a lay off. Following the lay off, Petitioner, pursuant to the collective bargaining agreement in effect, attempted to bump a less senior employee in order to retain her employment with Respondent Verizon. Respondent Verizon wrongfully denied Petitioner's requested bump, alleging that she could not bump as she could not learn the new position within the time allowed under the collective bargaining agreement. Petitioner then filed a grievance through her union, Respondent Communication Workers of America. Respondent Communication Workers of America failed to process Petitioner's grievance properly and in a timely manner, resulting in an arbitration decision in favor of Defendant Verizon. Said decision was specifically based on Respondent's Communication Workers of America failure to timely process the grievance to arbitration.

3. As a result of the arbitrator's decision of June 7, 2002, Petitioner filed the original action against Respondents in Federal District Court. The original action alleged a breach of the applicable collective bargaining agreement by Respondent Verizon and a breach of the duty of fair representation by Respondent Communication Workers of America. On August 1, 2003, Respondents filed motions for summary judgment. On March 31, 2004, Federal District Court Judge Edward J. Lodge, without entertaining oral argument, entered an Order granting summary judgment to both Respondents and dismissing Petitioner's entire case. This decision was based on the Court's finding that: 1) Petitioner's affidavit should be stricken as it was "self serving"; 2) With the striking of Petitioner's affidavit, there remained no question of fact regarding whether or not Petitioner could have learned the position within the time allowed; 3) Therefore Petitioner could not establish a claim against Respondent Verizon;

4) This deemed Petitioner's claim against Respondent Communication Workers of America moot. [1]

> *". . . the Court finds that there are no material issues of genuine fact and summary judgment should be granted in favor of Verizon . . . the Court finds the language in the CBA agreement to be unambiguous . . . (and to) create a requirement that an employee applying to bump into a position must be qualified to work the tasks of the incumbent employee or be able to acquire the necessary qualification (sic) one week of refresher training . . . therefore the question becomes was the bump denial by Verizon proper . . . it is undisputed that Ms. Bliesner was not qualified for the position without further training . . . the affidavit of Jeannie Sully . . . indicates the training time . . . is a few weeks . . . the Court agrees that Ms. Bliesner's statements that she could have trained in one week or less are conclusory, self-serving and do not create a material issue of genuine fact . . . as a matter of law . . . Verizon did not violate the CBA and is entitled to summary judgment . . . because the Court finds that plaintiff has failed to survive summary judgment as to her claim against Verizon, her claim against the union also fails . . . the Court need not address the union's alleged failure . . .* [2]

4. On April 9, 2004, Petitioner filed a motion for reconsideration, which was denied by the Federal District Court on July 1, 2004. Said motion argued that the Court had erred in: 1) Considering Petitioner's claim against the employer prior her claim against the Union; 2) Dismissing Petitioner's claim against the Union solely on the basis of the Court's decision regarding her claim against the Employer; 3) Striking the affidavit of Petitioner; 4) Weighing the evidence; and 5) Fail-

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[1] Order of Federal District Court of March 31, 2004, Appendix Exhibit A.

[2] *Id.*

ing to consider the alleged facts in a light most favorable to the non-moving party. [3]

5. On July 26, 2004, Petitioner timely filed a Notice of Appeal with the Ninth Circuit Court of Appeals. In that appeal Petitioner made arguments nearly identical to those contained in her motion for reconsideration. The Ninth Circuit's decision was filed on September 13, 2006. The Ninth Circuit's decision fully supported the Federal District Court's decision, on a near identical basis. [4]

6. On December 8, 2006, Petitioner timely files this petition to the United States Supreme Court requesting review on the basis set forth in the following section. Said Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit has incorrectly held that, in a § 301/ Unfair Representation "Hybrid" claim, even though the Unfair Representation claim is a condition precedent in order to prevail on the § 301 Breach of Collective Bargaining Agreement Claim, the District Court is free to decide the § 301 claim first. The Ninth Circuit has also incorrectly held that the dismissal of the § 301 claim warrants the automatic dismissal of the unfair representation claim, without consideration of any kind. The Ninth Circuit also wrongly affirmed the District Court's decision granting summary judgment to the Respondent Union on the grounds that its ruling dismissing the claim against the Respondent Employer required summary judgment in favor of the Union as well. Furthermore, the Ninth Circuit wrongly held that the District Court did not abuse its discretion in striking portions of the Petitioner's affidavit regarding the amount of training required for the position, while admitting affidavits on the same issue

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[3] Order of Federal District Court of July 1, 2004, Appendix Exhibit B.

[4] Ninth Circuit Opinion filed September 13, 2006, Appendix Exhibit C.

from employees of the Respondent therefore finding that there was no question of material fact regarding this issue.

## I. THE NINTH CIRCUIT'S DECISION THAT THE DISTRICT COURT MAY DECIDE THE § 301 AND UNFAIR REPRESENTATION CLAIMS IN ANY ORDER IS IN CONFLICT WITH DECISIONS FROM THE FOURTH CIRCUIT ON THE ISSUE AND PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

According to the Fourth Circuit, in a "Hybrid" claim, "federal courts review allegations against employers for breach of collective bargaining agreements *only* when an employee has first proved that the union representing him breached its duty of fair representation." *Thompson v. Aluminum Company of America*, 276 F.3d 651, 657 (2002). The rationale behind this requirement is that, as a general rule, the employee is required to exhaust internal and/or arbitration remedies, prior to bringing a claim for the breach of the Collective Bargaining Agreement, and the employee may be bound by the result of exercising the procedure. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 163 (1983). However, it is recognized that, if a union breaches its duty of fair representation, seeking such an internal remedy may be futile, and the finality of the arbitration may result in the denial of a potentially meritorious claim as a result of the breach. Therefore, the courts have allowed the employee to bring a hybrid unfair representation/301 claim against both the employer and the union. *Id.* at 164. In the case where it is determined that a union did not breach its duty of fair representation, the employee is then bound by the result of the arbitration under the agreement, and the claim against the employer must fail. *Id.* at 164–65.

However, it does not necessary follow that a breach of the collective bargaining agreement will excuse a union from its

duty of fair representation. This Court has held that, in deciding a claim for unfair representation, "[it has] never required a fair representation plaintiff to allege that his *employer* breached the agreement in order to prevail." *Breininger v. Sheet Metal Workers Int'l Assoc. Local Union No. 6*, 493 U.S. 67, 81 (1989). Although several cases do state that a Plaintiff must prevail on both claims in order to recover against either Defendant, *DelCostello*, 462 U.S. at 165, it is implicit in those holdings that a Plaintiff is pleading, and a court is deciding, the issues in the correct order. For example, in a claim against a union, but not the employer, if it is decided that a union did not breach its duty, then, of course, it is not liable in any event. In a claim against the employer, but not a union, if it is first decided that the union did not breach its agreement, then the employer is protected by the results of arbitration. If the Union did breach its duty, but the employer did not breach its agreement, then the employer is simply not liable.

The decisions of the District Court and the Ninth Circuit that the order in which the two issues are decided is not relevant, and that a determination regarding the claim against the employer automatically protects the Union from liability for any possible breach of its duty of fair representation, is in conflict with the prior decision of the Fourth Circuit in *Thompson*, creating a conflict between the circuits on an issue of national importance. In its decision, the Ninth Circuit cites decisions from the Sixth Circuit, *White v. Anchor Motor Freight, Inc.*, 899 F.2d 855 (6th Cir. 1990), and the Seventh Circuit, *Talbot v. Robert Matthews Distrib. Co.* 961 F.2d 654 (7th Cir. 1992), in which the Courts of Appeals had affirmed decisions in which the issue over the collective bargaining agreement was decided without reaching the fair representation issue, making the conflict with the Fourth Circuit even more apparent.

Furthermore, the Ninth Circuit's decision was in direct conflict with the prior decisions of this Court in *Breininger*

and *DelCostello*. The cited cases from the Sixth and Seventh Circuits serve to show that such misinterpretation of this Court's precedent is not simply an isolated incident, but a situation in which this Court must provide further clarity and certainty. In today's age of mobility and nation-wide commerce, it is vital that this Court resolve these differences, and clarify its requirements for a successful claim in such a labor dispute, in the interests of uniformity, the efficient operation of interstate business, the ability of a union to represent its members effectively, and the ability of employees and employers to avail themselves of remedies available under federal law. By granting a Writ of Certiorari in this case, this Court has the opportunity to prevent much needless litigation over what precisely are the requirements for a "hybrid" 301/fair representation claim in the future.

## II. THE NINTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S GRANT OF RESPONDENTS' MOTION TO STRIKE AND ENTRY OF SUMMARY JUDGMENT CONSTITUTED AN ERRONEOUS APPLICATION OF THE SUMMARY JUDGMENT STANDARD.

In its original decision, the Federal District Court struck the portion of the Petitioner's affidavit regarding the amount of training required in order to qualify for the position in question, basing its decision on a "lack of personal knowledge," while admitting the portion of the affidavit of an employee of Respondent Verizon on the same issue. The Ninth Circuit affirmed on the grounds that the District Court did not abuse its discretion in its decision to strike. *Bliesner v. Communication Workers of America*, 464 F.3d 910, 915 (9th Cir. 2006). Absent Petitioner's statement, the District Court held there was no longer a genuine issue of material fact, and therefore granted summary judgment on the issue of the alleged breach of the collective bargaining agreement.

However, there is no one better situated to determine her own abilities to learn a new skill than the person herself, and the other employee of Verizon (who had been with Verizon only two (2) years) was able to provide only an estimation as to how much time is required, on average, to train an employee to qualify for a new task. Petitioner had over twenty-five years experience at Verizon, and could certainly provide an estimate as to her abilities to learn the required skills. Federal Rule of Evidence 602 sets forth the rule regarding evidence constituting personal knowledge, and has been used as a direct analogy to the personal knowledge requirement of Federal Rule of Civil Procedure 56(e). *See, e.g., Bryant v. Farmers Insurance Exchange*, 432 F.3d 1114, 1123 (2005). Under Rule 602, courts have determined that "Personal knowledge can include 'inferences and opinions, so long as they are grounded in personal observations and experience.'" *United States v. Rodriguez*, 162 F.3d 135, 144 (1st Cir. 1998). Petitioner's long tenure at the Verizon provides such grounds. The alleged "conclusory" or "self-serving" nature of the statement go to weight, not admissibility, and certainly may be taken into account by the trier of fact. This amounted to the District Court's improper weighing of the evidence and failing to view the facts in a light most favorable to the non-moving party. Therefore, the District Court's decision to strike the statement constitutes a clear abuse of discretion, and the Ninth Circuit erred in affirming the ruling. Thus, there remains a genuine issue of material fact as to whether or not the collective bargaining agreement was breached, and the Ninth Circuit was in error.

Given the prominent role Rule 56 Summary Judgment plays in federal litigation, and the use of affidavits in support and in opposition to such motions, clarity on this issue is crucial. Thus, this Court should grant the Petition for Certiorari, and hear this issue, in order to correct and prevent such erroneous rulings from occurring in the future.

In light of the conflict between the Ninth Circuit's decision and the decision of the Fourth Circuit regarding the order in which the two related issues in a "hybrid" labor claim may be decided, and the fact that the Ninth Circuit's decision regarding automatic dismissal of the claims against the Union is in direct conflict with binding precedent established by this Court, it is vital that the Supreme Court of the United States hear and resolve this issue. The relationship of employee-union-employer, and their respective rights under federal law are of pressing national importance, especially in this age of heightened competition and our global economy. Furthermore, this Court must examine the Ninth Circuit's affirmation of the District Court's Order striking the Petitioner's opinion from her affidavit, and its subsequent effect on the summary judgment ruling. To allow such an erroneous ruling to stand without granting review would have adverse effects on our civil system, as it relates to an important tool of civil procedure.

## CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant her Petition for a Writ of Certiorari and agree to review this matter.

Respectfully submitted,

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